

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 752 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgement?
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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IDEAL MOTORS LTD

Versus

PATEL MOTILAL JYOITARAM THROUGH

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Appearance:

MR SHALIN MEHTA for M/S. GIRISH PATEL ASSOCIATES

for appellants

MR NA PANDYA for Respondent.

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CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 28/07/2000

ORAL JUDGEMENT

This is defendants' First Appeal against the  
judgment and decree passed by the Court of Jt.Civil Judge  
(Senior Division), Ahmedabad (Rural) at Narol, passed on

30th April 1980 in Special Civil Suit No.95 of 1976 whereby the suit was decreed in favour of the plaintiffs.

2. The original plaintiff, namely, Motilal Jyoitaram filed the present Special Civil Suit on 30th September 1976 in the Court of Civil Judge (Senior Division), at Narol on the basis of the cause of action against the defendants which arose to him on 16th June 1976 when he had withdrawn his earlier Suit No. 30 of 1971 on the basis of a purshis dated 16th June 1976 and thereafter on 23rd August 1976 when the defendants wrote a letter to him that the sale deed is to be executed by 30th September 1976 and thereafter on 6th September 1976, 10th September 1976 and 27th September 1976 when the correspondence transpired between the parties in this regard. The original plaintiff, namely, Motilal Jyoitaram expired during the pendency of the suit and his heirs were brought on record. The property in question is situated in village Dehgam and consists of the land bearing Survey No.490 and the super structure thereon which belonged to the defendants. The suit property was given on rent to the plaintiff on 29th October 1957 on the basis of a lease deed executed between the parties. This lease deed was registered in the office of the Sub Registrar. Thus, the suit property was taken on lease by the plaintiff at the rent of Rs.5305/- per year. The property was taken on lease as above for a period of 10 years and the condition was that in case the plaintiff want to take the said property on lease for another period of 10 years after the expiry of the 10 years for which it was given in the year 1957, the plaintiff will be required to give in writing an intimation three months prior to the date of expiry of the period of lease. The initial period of 10 years of this lease was to expire in October 1967 and the further period of 10 years was to commence from 26th October 1967. The say of the plaintiff is that it was agreed between the parties that no other document of lease deed was to be entered into for this purpose. It is also the say of the plaintiff that the other condition of the lease deed was that if the plaintiff wanted to purchase the suit property during the period stipulated in the lease deed, the defendants shall sell the suit property for Rs.42,401/- to the plaintiff and that the expenses for the execution shall be borne by the plaintiff and at the time of such sale, if any amount is lying with the defendants, the defendants shall give set off for that amount towards the price of the suit property. The plaintiff had accordingly deposited Rs.5,101/- with the defendants and the defendants had agreed to pay interest at the rate of 4% on this amount. The defendants then gave a notice on

7.10.1967 in connection with the lease deed and the plaintiff gave reply on 11th June 1968. In this reply, the plaintiff intimated the defendants that as per the terms of the lease deed, he had intimated the defendants about the extension of the lease period for 10 years. The defendants gave another notice on 14th April 1969 and the plaintiff gave a reply on 29th October 1969. The defendants then filed the suit against the plaintiff in the Court of Civil Judge (Junior Division), at Dehgam being Regular Civil Suit No.29 of 1970. In that suit, the compromise was entered into and as per the terms of that compromise, the possession of the suit property was to be given on 30th May 1971. As per the terms of this compromise, the suit property was to remain in possession of the plaintiff upto 30th May 1971 on the basis of user and occupation and in case the plaintiff fails to hand over the suit property, the defendants could recover the possession of the same in execution proceedings. It was also agreed that the plaintiff was not to make any demand or has not to raise any dispute while handing over the possession of the suit property and that the plaintiff had to hand over the possession of the suit property in the condition in which it was, at the relevant time, without making any demand of money. In that compromise, it was also mentioned that the defendants were giving the concession to the plaintiff that if the plaintiff pays to the defendants all the amount that is required to be paid over and above the amount of Rs.42,500/- on or before 30th May 1971, the defendants' rights in the suit property by virtue of the lease deed shall be treated as rights acquired by the defendants. That the defendants shall have to execute the transfer deed and that it was to be treated that the defendants had no right in the suit property. It was further the case of the plaintiff that as per the clear understanding between the parties, the defendants had agreed to sell their rights in the suit property after taking the amount of Rs.42,501/- as mentioned in the sale deed. According to the plaintiff, it was further agreed that the plaintiff has to give the due rent as well as the amount of mesne profit to the defendants. On the strength of this compromise, the plaintiff requested the defendants to make clear the titles of the property and to sell it to the plaintiff. It was alleged that the defendants went on finding excuses and thereby they were extending the time to execute the sale deed. The plaintiff, therefore, filed Special Civil Suit No.30 of 1971 against the defendants claiming the relief to direct the defendants to sell the suit property and to execute the sale deed. The said Special Civil Suit was proceeded further and on 16th June 1976, the defendants told the plaintiff that as per the

compromise in Civil Suit No.29 of 1970 filed in the Dehgam Court, if the plaintiff will pay the mesne profit, expenditure and costs and the price of the suit property upto 30th July 1976 to the defendants, they will execute the sale deed. It was also averred that the plaintiffs placing reliance on such representation of the defendants, withdrawn the suit on 16th June 1976. After 27th July 1976, a letter was written by the plaintiff to defendants with regard to the amount to be paid. In the said letter, the plaintiff also required that the defendants to settle the final account and the dues of each other. The plaintiff also intimated the defendants to resolve the dispute. The plaintiff then sent the accounts to the defendants by post and the defendants replied on 23rd July 1976 and in this reply, the defendants stated that they were prepared to execute the sale deed in respect of their rights in the suit property if the plaintiff gives all the dues as per the decree of Dehgam Court upto 30th September 1976. That in reply to this letter, the plaintiff wrote another letter on 6th September 1976 and a clarification was made about the particulars of the accounts between the parties. The defendants again replied on 10th September 1976 and demanded the amount that may be found to be due after the settlement of account between the parties. According to the plaintiff, it transpired from the correspondence that the defendants admitted to execute the sale deed, but there was a dispute about the accounts. Lastly, the plaintiff sent a letter dated 27th September 1976 to the defendants to give clear amount but the defendants did not reply. It was further averred in the plaint that the plaintiff was prepared to pay the due amount and was also prepared to pay the price of the suit property. The defendants had averred that if the plaintiff pays such amount upto 30th September 1976, they will execute the sale deed. It is alleged that the defendants were extending the time in clearing the accounts between the parties and the time was consumed and the plaintiff was suffering the loss. The plaintiff then filed the suit on the stipulated date, i.e. 30th September 1976 so as to cause the defendants to sell the property by executing the sale deed. It was also stated that the plaintiff was prepared to deposit the amount of the price of the suit property and the other amount as mentioned in the letter dated 27th September 1976 in the Bank as per the order of the Court and that the plaintiff was making this offer in order to show his bonafides. The plaintiff prayed for a decree directing the defendants to sell the suit property to the plaintiff and to pass the decree in his favour and against the defendants.

3. The defendants filed the written statement at Exh.21 inter alia, contending that the suit was not maintainable and that the suit was barred by limitation, it was barred by the principle of non-joinder, latches, waiver and acquiescence. It was also contended that the terms and conditions of the original lease deed were binding upon both the parties; that consent decree in Civil Suit No.29 of 1970 was also binding. According to the defendants, the final decree had been passed and the defendants had given certain concessions to the plaintiff. Such concessions were given without prejudice to the case of the defendants and without affecting adversely the decree which had been passed in Civil Suit No.29 of 1970. That the plaintiff had failed to avail the concessions as was given by the defendants. The plea was also taken that the suit was barred by the principles of res-judicata and that it was also barred under Order 23 Rule 4 of CPC and it was also stated that even now the plaintiff could show the bonafides and financial soundness by depositing the amount of Rs.75,000/- in the Court within one month from the date of filing of the written statement, i.e. 29th March 1978. The suit was thus sought to be dismissed.

4. On the pleadings of the parties, the following Issues were framed and the findings as were recorded by the trial Court against the said Issues are also mentioned hereunder against each Issue:

(1) Whether the plaintiffs Yes.  
prove that though time  
fixed upto 30.5.1971  
has expired their right  
to purchase and get the  
sale deed executed from  
defendants is still  
alive?

(2) Whether the plaintiffs Partly proved and  
prove that they were partly not proved  
ready and willing to  
perform their part of  
contract but the  
defendants committed  
the breach of contract  
i.e. a term of a  
decree?

(3) Whether the suit is No  
hit by the principle  
of res-judicata?

(4) Whether the suit is Decided in negative.  
hit by Rule 4 O.23 CPC.  
C.P.Code?

(5) Whether the suit is Proved in affirmative.  
barred by the period  
of limitation?

(6) Whether plaintiffs Yes.  
are entitled to the  
reliefs sought for?

(7) What order and decree? As per final  
order.

(8) Whether the suit of Not proved.  
the plaintiffs is not  
tenable or maintainable?

(9) Whether the suit of No  
the plaintiffs is  
barred by non-joinder  
of parties and delay,  
laches, waiver and  
acquiescence?

(10) Whether the decree Yes.  
passed in R.C.S.No.29  
of 1970 is final and  
is binding to the  
plaintiffs?

5. During the course of arguments, learned Counsel for the appellants laid much stress with regard to Issues Nos.3 and 4. I have heard learned Counsel Mr.Shalin Mehta on behalf of the appellant as well as Mr.N.A.Pandya appearing on behalf of the respondents. The Suit No.30 of 1971 had been withdrawn on the basis of a purshis with no objection of the defendants, there was no determination on any of the points in the Issue between the parties and therefore, there is no question of invoking the principles of res-judicata and the suit could not be dismissed on the ground of principles res-judicata. So far as Issue no.4 to the effect that the suit was barred by Order 23 Rule 4(1)(4) of CPC, this Court finds that true it is that the suit was withdrawn without the permission as referred to in sub-rule (3), the fact is established on record that it was withdrawn on the basis of a purshis i.e. originally Exh.82 in the

Civil Suit No.30 of 1971 and the certified copy of which was exhibited at Exh.53 in the present suit. I have gone through the said documents, i.e. purshis at Exh.53 and find that in this purshis, a clear mention has been made about the earlier decree in Civil Suit No.29 of 1970 on the basis of an understanding arrived at between the parties and the settlement to which the parties had entered out of the Court. The Court had recorded the same on 16th June 1976 itself and this purshis also shows that the defendants' Counsel had given his no objection for costs as well as withdrawal after seeing the contents of the purshis. Learned Counsel for the appellant has placed reliance on a Division Bench decision of this Court in the case of Laxmidas v. Lohana Bai reported in AIR 1970 Gujarat 73. Para 24 of this judgment on which the reliance has been placed shows that in that case, the suit was withdrawn without prejudice to the lawful right and remedy. The Court held that it could not mean to convey in any manner that the plaintiff claimed a liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim as required under Order 23 Rule 1 Clause (2) of the CPC. The Court has held that what the plaintiff has to ask for is such permission referred in sub-rule (2) which is so essential so as to avoid any such bar contemplated in Clause (3) of Rule 1 of Order 23 and such permission was neither sought for nor granted by the Court so as to see that the bar in instituting the fresh suit in respect of same or similar subject matter as one of the suit cannot exist. There cannot be any quarrel with the said proposition of law and the scope of Order 23 Rule 1(3) as has been explained by the Division Bench in the aforesaid decision but in the facts of the present case, it is found that the Civil Suit No.30 of 1971 was withdrawn by the plaintiff relying on the say of the defendants that they will execute the sale deed in respect of the suit property. The contents of the purshis clearly go to show that relying upon the say of the defendants that they will execute the sale deed in respect of the suit property, the suit was sought to be withdrawn and it further appears from the contents of this purshis that the settlement had been arrived at. Such settlement could not be anything else, but the defendants' permission to execute the sale deed which was believed by the plaintiff for the purpose of withdrawing the suit. That is the real purport and import of the purshis. If that is the real import of the contents of the purshis and the learned Counsel who appeared in the suit for the defendants had given his no objection after going through the contents of this purshis for the purpose of costs and withdrawal of the suit, it cannot be said that merely because the permission was not sought

for filing the fresh suit, the present suit was barred under Order 23 Rule 1(4). In fact, it appears to be a case of fresh cause of action on account of the breach of the understanding or the promise or the assurance or the settlement which had been arrived at between the parties at the time when the purshis was filed and merely by taking advantage of the form of purshis and by saying that there is no specific mention in this purshis about the promise made by the defendants, it cannot be said that the suit was barred under Order 23 Rule 1(4) of the CPC. The date of purshis is 16th June 1976, but later on the defendants did not execute the sale deed on 30th July 1976 and vide letter dated 23rd September 1976 they extended this period upto 30th September 1976 to execute the sale deed in respect of the suit property and when the sale deed was not executed upto 30th September 1976, the plaintiff filed the present suit. This Court, therefore, fully agrees with the finding of the trial Court that the cause of action in the present suit was different than the cause of action on the basis of which Special Civil Suit No.30 of 1971 was filed and that the cause of action accrued for the present suit on 16th June 1976 when the suit was withdrawn on relying upon the statement made by the defendants on 23rd August 1976 when the defendants wrote the letter to the plaintiffs making further offer to execute the sale deed if the plaintiffs pay the purchase price etc. on or before the extended date. Therefore, the suit was filed on the cause of action which arose on and after 16th June 1976. In the previous suit, the cause of action had accrued to the plaintiffs on 30th January 1971 when the consent decree was passed in Regular Civil Suit No.29 of 1970 and on 30th May 1971 when the sale deed in respect of the suit property was not executed in terms of the consent decree. Therefore, this Court finds that the subject matter was the same but fresh cause of action had arisen to the plaintiffs for filing the present suit and therefore, this suit could not be held to be not maintainable on the basis of Order 23 Rule 1(4) of the CPC.

6. I have also gone through the findings on other Issues as recorded by the trial Court and I find that for recording the findings on each of the Issues, the trial Court has given elaborate reasons and these findings are based on proper material, they have been correctly recorded and there is no basis to disturb any of these findings.

7. In the result, this Court finds that there is no force in this appeal. This appeal fails and the same is hereby dismissed. No order as to costs.



(M.R. Calla, J.)

Sreeram.